EMPLOYEES' RETIREMENT SYSTEM OF THE COUNTY OF MILWAUKEE
MINUTES OF THE JANUARY 22, 2020 PENSION BOARD MEETING

1. Call to Order

The Chair called the meeting to order at 8:34 a.m. at the Marcus Center for the Performing Arts, 929 North Water Street, Milwaukee, WI 53202.

2. Roll Call

Members Present	Members Excused
Fernando Aniban	
Linda Bedford (for items 5-14)	
Laurie Braun (Vice Chair)	
Michael Harper (Chairman)	
William Holton	
Elena LaMendola	
LaValle Morgan	
Ronald Nelson (for items 3-12(c))	
David Robles	

Others Present

Erika Bronikowski, Interim Director - Retirement Plan Services
Anne Berleman Kearney, Deputy Corporation Counsel
Julie Landry, Chief Human Resources Officer
Brett Christenson, Marquette Associates, Inc.
Jessica Culotti, Reinhart Boerner Van Deuren s.c.
Nick Moller, JP Morgan
Jim Sakelaris, JP Morgan
Darcie Muckler, ERS retiree
Lorraine McNamara-McGraw, Attorney for Ms. Muckler

3. Chairperson's Report

The Chair stated he would start his report with a quote attributed to Dr. King:

> Our lives begin to end the day that we become silent about the things that matter.

The Chair stated this quote has played in his mind all week in terms of the things that matter and the work that the Board does here. He noted this work matters not just for the Board but for the 13,000 plus members of ERS that this Board is charged with overseeing.

The Chair then thanked everyone for attending. He noted he was also reflecting on something that the County Executive and his staff published last April in Resolution 19-397, which dove-tails into how we look at race and diversity in a time that America appears to be more divided than any other time since the Civil War. He stated that as the Board continues to embrace each other, and inclusion, this work is something that matters. The Chair noted he has put a lot of his time and energy into serving this Board and trying to identify things that will make this Board better and more effective. He further stated he appreciates the Board members' support and participation in that progress because it is a collective effort. The Chair noted that it is also important that the Board have partners - external as well internal – in order to fulfill the Board's obligations as fiduciaries.

The Chair stated that he would conclude his remarks with those comments and proceed with the agenda.

4. Minutes

(a) Meeting Minutes - December 18, 2019

The Chair asked if there were comments or questions regarding the December meeting minutes, and seeing none, he stated he would entertain a motion to approve the minutes as drafted.

The Pension Board unanimously voted to approve the minutes of the December 18, 2019 Pension Board meeting. Motion by Mr. Holton, seconded by Mr. Aniban.

5. Investments

(a) JP Morgan

The Chair invited the representatives from JP Morgan to present the Board with their update on JP Morgan's infrastructure investment fund. Mr. Sakelaris distributed booklets to the Board.

Mr. Sakelaris thanked the Chair and the Board for having them here today. He further noted that more importantly, JP Morgan appreciates the partnership that they have had with the Board for the last 10 years in this infrastructure fund. Mr. Sakelaris introduced his colleague Nick Moller as an investment specialist on the infrastructure team. He explained that they will review the Fund and also talk about the fee discount that JP Morgan has offered. Mr. Sakelaris stated that he is sure that the Board has had conversations with Marquette on the topic, but he and

Mr. Moller can also answer any questions the Board may have on that topic. Mr. Sakelaris then asked Mr. Moller to continue the presentation.

Mr. Moller thanked Mr. Sakelaris and stated he would start with a brief review on what JP Morgan does in this Fund. Mr. Moller explained that it is diversification, inflation projection and yield. He stated that while this is seemingly a very simplistic objective, it is much more nuanced. Mr. Moller stated that what they are trying to do with this Fund is mitigate commodity growth and other risks that have traditionally been in the rest of the portfolio. He noted that is something JP Morgan remains very focused on.

Mr. Moller continued by explaining how they do this. He stated the Fund focuses on long-term contracted assets, ten years plus. Mr. Moller explained that is mostly renewables, regulated assets or regulated monopolies. For example, water, gas or electric. Mr. Moller explained the key is that commodity risk is passed to customers, not the Fund. Accordingly, they hope these investments are "boring." They want steady, stable returns, regardless of whether it is a good financial market or poor financial market.

Mr. Moller next discussed the history of the Fund. He stated the Fund has been around since 2007, and this is ERS's tenth year with JP Morgan. Mr. Moller explained that over the last 13 years since the Fund began, it has grown to approximately $12 billion. He noted that recently, the Fund has diversified a lot. The Fund raised about $4.5 billion last year, and currently has 19 portfolio companies and 464 assets across many sectors and subsectors. Mr. Moller explained that part of the objective in this asset class is to mitigate the risks, operational and political. The key to doing that is having many assets in many places, as the Fund has now. Mr. Moller explained that the Fund is going to continue to grow and diversify, which is part of the objective of the fee change that they can discuss later on. Mr. Moller further explained that the Fund targets realistically 8% to 9% net returns for this strategy and 5% to 7% cash yield. He noted the Fund has been very focused on cash distributions as a risk profile metric. If more returns are coming in cash, the Fund cares less about commodities, growth or what happens in the presidential election.

Mr. Moller next discussed the Fund's investment philosophy. He explained that the Fund's open ended, long-term structure matches the types of assets they are investing in and they control the investments. Mr. Moller stated that the Fund is controlling 15 out of 19 of companies at this time. He explained that is critical to what they do in this strategy. A key part of the Fund's investment approach is "platform investing."

Mr. Moller explained that Fund has a long-term investor base. Six or seven years ago, the Fund was about $3 billion and now it has grown to $12 billion. He noted they expect it to be $16 billion when the Fund deploys the capital that is currently in queue.

In response to a question from the Chair, Mr. Moller said that the vast majority of growth is new capital, with about a third from existing clients adding to their investments and the other two-thirds coming from new clients.

In response to a follow-up question from the Chair, Mr. Moller stated that while there is a lot of capital raised in this space, it is a broad space when thinking about the public companies that are involved in infrastructure. He noted people are focused on privatization of public assets when they think about this asset class, but the vast majority is private-to-private transactions. Mr. Moller explained the only privatization the Fund has done is moving an airport in Australia from government-controlled to private-controlled.

Mr. Moller continued by reviewing the Fund's investment team. He stated there was a team change in the strategy seven years ago, and that coincided with the pick-ups and returns that occurred. Mr. Moller clarified the team has been very stable since then with lot of growth at the junior levels. He stated they believe culture is important for this Fund, so they tend to hire at junior levels and promote from within. Mr. Moller noted that while they still have work to do, they have been very focused on diversity, whether it be gender, race, or otherwise. Mr. Moller explained this team is 100% dedicated to this Fund, and they only work on this one strategy.

Mr. Moller next described the diversification of the Fund. He pointed the Board to a page in the booklet that provides a nice visual of how diversified the strategy is globally at this point. Mr. Moller stated they remain focused on high income, stable economies, such as Western Europe, the U.K., the U.S., Canada and Australia. He explained they are not moving into more peripheral or emerging market countries. Mr. Moller clarified they remain very much a global fund to get the broad diversification the Fund needs. He stated that the Fund is invested in many subsectors at this point. Mr. Moller noted they are not too focused on areas such as telecommunications, where technology changes quickly. Instead, the Fund focuses on long-term contracted and regulated assets, including storage, railcar leases and airports. Mr. Moller highlighted that what has been very important is being broad and diversified in the portfolio companies. He explained that the Fund's largest company, Ventient at 19%, consists of many wind farms across Europe. Accordingly, it is not one asset. Mr. Moller noted the Fund's largest single asset exposure is about 6% of the Fund, which in private infrastructure is very low. Overall, he explained the diversification has been critical to some of the results the Fund has achieved.

Mr. Moller then called for questions and seeing none, he reviewed the portfolio companies. He stated he would not review each company but would provide some examples. In the U.S., Mr. Moller stated that the Southwest Water Company is regulated water across several states within the U.S., particularly in the southwest. Summit Utilities is a gas distribution business across several states including Colorado, Missouri, Maine, Oklahoma, and Arkansas. Mr. Moller explained on the GDP-sensitive side, the Fund owns Nieuport Aviation, which operates the terminal in Toronto's downtown airport. Mr. Moller clarified that while the Fund has many different assets, a lot of what they are doing is adding to these businesses. As an example, Summit Utilities 13 years ago was a $40 million investment in Colorado. The Fund incrementally expanded into Missouri, then Maine, and then they recently added Oklahoma and Arkansas. Mr. Moller explained this has been progressive growth over time, which has been critical to their approach. Mr. Moller noted that with the Fund's current assets, if the Fund did nothing, ten years from now it will be 50% contracted and regulated. He explained that if there is another global financial crisis, they know where the yield and returns are coming from.

Mr. Moller continued by reviewing the ESG considerations for this strategy. He explained that they believe "Governance Comes First." Mr. Moller noted the Fund controls these businesses and implements the policies. He stated they are extremely focused on these ESG elements because if the regulators do not like you, if the customers do not like you, if you are violating environmental regulations, returns will suffer. Mr. Moller explained that ESG is directly aligned with optimal risk-adjusted returns for the Fund, and they are effectively rated A rated by the UN PRI. The Fund is also one of the highest-ranked funds in GRESB, which is an ESG-rating organization for real estate infrastructure. Mr. Moller stated that the Fund spends a lot of time on these issues because first, it is the right thing to do, and two it is directly aligned with the return and risk strategy.

Mr. Moller asked if there were any questions before he continued. The Chair asked about the racial and ethnic diversity at JP Morgan. The Chair noted there have been some headlines recently involving JP Morgan Chase related to this issue, so he was curious how they are addressing it. Mr. Sakelaris stated that their Chairman came out and explained that this is not how JP Morgan operates in their business. Mr. Sakelaris clarified that JP Morgan has put forth a tremendous amount of effort, energy and capital to increase their diversity, especially here in the U.S. As an example, JP Morgan is part of the University of Michigan's recruitment effort, and they host many minority-only events to try to gain interest.

Mr. Sakelaris noted that one of the issues is simply trying to get young people interested in their line of work. He explained that a lot of young people want to chase the tech world or go into marketing, not finance. Mr. Sakelaris stated that JP Morgan has put on a lot of effort into presenting to young people at the university-level what JP Morgan does to try to get them interested. Mr. Sakelaris clarified that it is definitely an ongoing effort. Mr. Moller added that while he does not have the exact statistics, the Fund's female employees have gone from 9% to 40% over the last six years, so they are making improvements in at least that category of diversity. Mr. Moller clarified that they are also making improvements in diversity in the businesses they own and control. He explained that regulated utilities have historically not been, from any perspective, very diverse. Instead, they tended to have older white male work forces. Mr. Moller stated this is something they are very focused on changing because if there is not a sustainable workforce, there is not a sustainable return on investment.

In response to a question from the Chair regarding cyber security, Mr. Moller stated this issue has been very important for the Fund's strategy. He explained that each of the companies have its own board and their own subcommittees on cyber security. However, they are sharing what they learn across all the companies. For example, Mr. Moller stated that one company received a phishing e-mail wanting them to pay an invoice related to another portfolio company. This attempt was immediately shared with the other companies, and then analyzed with JP Morgan's own corporate cyber security team. Mr. Moller stated that JP Morgan spends billions of dollars per year on cyber security because this area is a challenge due to the constantly changing threats.

Mr. Moller next reviewed the Fund's recent acquisition activity. He stated as he previously noted, the Fund has grown a lot. He explained they are progressively adding incrementally to the portfolio companies, so most of what they are doing does not rise to the level of the Wall Street Journal or the New York Times. Mr. Moller stated that even when they add a new business, it is $300 million or $400 million in size, and they are looking for that to be a platform going forward. Their approach is to keep growing what they previously acquired using the long-term structure.

Mr. Moller continuing by describing the Fund's returns. He stated that over the last three-years, the Fund has had about an 8% net return and 8.7% over the last year. Mr. Moller noted that this is exactly where the Fund expects to be as its general expectation is 8% to 9% net returns. Mr. Moller stated that yield has also been strong with 6%-7% as the expectation and 7.7% as the three-year yield. Mr. Moller noted that a year ago they launched a hedged option, which ERS did join. He explained that about $3 billion is invested in that program. The U.S. dollar hedge return was 11.2% for the last year. Mr. Moller explained that the key from a return perspective is the volatility of returns. Here there are steady, stable returns without the noise of foreign exchange.

In response to a question from the Chair about the amount of leverage generally used in a transaction, Mr. Moller stated that it is currently in the aggregate about 50% at the Fund level. He clarified that some business areas may be more like 25%-30% and some long-term contracted businesses may be 70% or 75%.

Mr. Moller continued by reviewing the fee schedule proposal that was released to the Fund's investors last October. He explained that the proposal has two parts, the management fee reduction, which is a 5% upfront reduction in management fees for people who elect yes. When the Fund reaches $20 billion there will be a further 5% reduction. Mr. Moller explained that from an incentive fee perspective, the proposal does not change the hurdle, the sharing or the catchup. Instead, what they are changing is the timing and simplifying the process. Mr. Moller stated that the way it works now is extremely complex and different for every investor. He stated overall, investors would see a reduction in fees. Mr. Moller explained there may be, in theory, an extreme scenario where if the returns all of a sudden became really volatile, it could be less favorable. However, this is unlikely. Mr. Moller stated that the responses are due back by February 7, and they have received 50% of the responses so far and only one "no." Accordingly, they expect to get to the 75% approval threshold. They are mainly working on making sure people get their forms submitted. Mr. Moller encouraged the Board to make an election, and stated he is happy to take any questions on the topic.

In response to a question from the Chair, Mr. Moller stated the changes are to measurement, timing and reinvesting. After further discussion on this topic, Mr. Moller asked if there were any other questions.

In response to a question from Mr. Aniban, Mr. Moller stated that infrastructure bills generally have bipartisan support no matter the administration. He explained that the challenge is always how to fund these bills because there is no simple answer. Mr. Moller further explained that there is likely to be an infrastructure bill that will be passed.

The Chair asked for any further questions and seeing none, thanked Mr. Moller and Mr. Sakelaris for their presentation.

(b) <u>Marquette Associates Report</u>

(i) <u>Monthly Report</u>

The Chair asked Mr. Christenson to present Marquette's report. Mr. Christenson thanked the Chair and distributed the monthly booklets to the Board.

Mr. Christenson started by reviewing the markets, which he noted for 2019 were very strong. He explained the S&P 500 ended the year up 31.5%, under fixed income, the Aggregate Index was up 8.7% and under non-U.S. equity, the ACWI was up 21.5%. Mr. Christenson continued by stating that real estate, which is taking a little bit of a break, had returns of 6.2% for the year. He noted that the year-to-date is only 4.8%, but the data is not all in so it will likely be about 6%. Mr. Christenson noted that even hedge funds had a good year, and although ERS does not have much exposure to commodities, commodities had a good year too. Mr. Christenson explained that the year was positive, overall. He noted growth is still outperforming a little bit and U.S. is outperforming non-U.S. a little bit. Mr. Christenson further noted large cap is outperforming small cap, but these things will eventually revert.

Mr. Christenson next reviewed ERS's portfolio. He stated Segall Bryant is still on alert for international small cap, as is UBS in real estate. Mr. Christenson stated the market value of the Fund is a little over $1.733 billion. With regard to the asset classes in relation to the Policy, Mr. Christenson noted that fix income is about 2% underweight and equities is about 1% underweight. ERS is overweight in real estate, but he explained there will be some capital withdrawals coming from UBS. Mr. Christenson stated the portfolio is protected from significant market swings at this time, at least compared to ERS's peer group. He explained that while the portfolio is protected, it is still able to participate on the upside.

Mr. Christenson continued by reviewing ERS's returns. He noted that in reviewing the summary cash flow table, 5 years ago, ERS's portfolio was at $1.79 billion and today is at $1.733 billion. Accordingly, the returns are flat with $633 million in net investment returns and cash flow of about $690 million. Mr. Christenson explained this is a reminder of why the portfolio is invested the way it is. He stated while this is a sobering thought, the good news is that the total Fund composite is up 15.2% for the year. Mr. Christenson noted this will likely increase slightly once the remaining asset classes are priced in. Mr. Christenson stated in fixed income, ERS's portfolio outperformed the benchmark 9.5% versus 8.7%, but in U.S. equities, 27.4% versus 31% from the benchmark. He noted there is a little bit of small cap and a little bit of value bias, which is the really the main reason for that return. He stated on the international side, ERS underperformed the benchmark 20.9% versus 21.5%. Mr. Christenson stated this is likely due to Segall Bryant having a difficult year. In hedged equity, ERS had a very good return and infrastructure, also had a strong year. Mr. Christenson noted that real estate is the biggest red flag for the year as the Board is aware.

Mr. Christenson next reviewed some of ERS's managers. He stated ERS's newer managers are off to a good start. Galliard had a great year up 9.8%, and on a two-year number, they are nicely above the benchmark. Mr. Christenson stated TCW was up 3% in the fourth quarter, where the other team managers in that class were flat. QMA, on emerging market small cap, is above the benchmark on the one-year return, 12.4% versus 11.5%. Mr. Christenson stated that under U.S. equity, the value managers have been struggling. Boston Partners did a little bit better in the fourth quarter, but they ended up behind for the year. Mr. Christenson noted Boston Partners' long-term numbers are still tracking nicely. On small cap, Silvercrest was up around 25% last year, and their benchmark was only up 22%. Mr. Christenson stated there have been a number of bright spots in the managers, and the spot that has been of concern, Segall Bryant, had a little bit better fourth quarter, up 12.2%.

In response to a question from the Chair, Mr. Christenson agreed that there could be further discussions about active versus passive managers and taking on some of these biases. He noted that the Board reduced its biases a little bit on value and small cap. Mr. Christenson stated over the last ten years, where active managers have underperformed, large institutional investors like ERS have pushed more and more money into passive investments. However, in the S&P 500, 20% of that index is only a tenth of stocks. Therefore, the more passive a portfolio goes, the more concentrated it gets of the largest stocks. Mr. Christenson noted that the Board has done work to add in Segall Bryant and QMA. The risks is this concentrated manager philosophy when going into these asset classes. Mr. Christenson explained that the Board cannot gain passive exposure in international small cap or emerging market small cap, and if it does exist, it is going to be expensive. Mr. Christenson commented that because of ERS's cash flows, the model has to be really conservative compared to another fund that does not have negative cash flows.

In response to a question from the Chair, Mr. Christenson stated that with Siguler Guff II and III, one is a vintage from 2012, and one is from 2016, which is a little bit newer. He explained that the two important numbers are the IRR and the Long Nickels PME (public market equivalent). Mr. Christenson stated, for example, the IRR since inception on the 2012 Siguler Guff Fund II is 11.7%. Mr. Christenson explained this is a little disappointing because the PME, which is for every dollar ERS puts in and got back from this fund, if it would have been invested in the S&P, it would have been 13.24%. Mr. Christenson further explained that there are two goals with private equity. First, is double digit returns, and second outperformance of the public markets. He noted it is a little tough when the public market equivalent of S&P has been on a tear, but that one fund in particular is slightly behind. Mr. Christenson stated that the Board did not re-up with Siguler Guff, and instead found some other managers that will hopefully do better going forward. He explained there is a lot of diversification in JP Morgan where as IFM is a little more concentrated. Mr. Christenson explained that the Board has taken a unique approach to address the cash flow situation, and how it proceeds going forward is up for further discussion.

Mr. Christenson stated this covers most of what he wanted to mention with one last note on the charts at the end of the flash report. He stated the first one is a five- and ten-year return versus standard deviation. Mr. Christenson explained it is return versus risk chart. He noted this is a lot less risky than the overall plans in the overall market where a lot of plans are more aggressive than ERS with a few plans that are less risky than ERS. Mr. Christenson further noted that a lot of these plans are also underperforming ERS. He stated the Board has done a nice job on the five-year and the ten-year returns, taking risk off the table, which is necessary because of the negative cash flows. The current allocation also keeps up at least with median returns by being creative in some of these alternative plans.

(ii) Private Equity RFP

The Pension Board discussed this item later on in the meeting during the discussion of the Investment Committee meeting.

(c) Fee Update

Mr. Christenson then discussed the fee proposal from JP Morgan. He stated that the Board and the Investment Committee have discussed the proposal at the last couple of meetings and JP Morgan talked about the proposal today. Mr. Christenson stated that the Board will need to make a decision today about whether or not to take the new fee. He noted that as he mentioned at the last meeting, Marquette is recommending that the Board does elect to participate in the new fee structure. If the Board does not elect it, ERS will not get the deduction in management fees, which will be a nice benefit to the Plan. Mr. Christenson stated that the election has to be made by February 7.

The Chair stated that unless there are additional questions or comments on this, he would entertain a motion to take the recommendation from Marquette to accept the fee proposal presented by JP Morgan.

The Pension Board unanimously voted to accept Marquette's recommendation and approve the fee proposal presented by JP Morgan. Motion by the Vice Chair, seconded by Ms. Bedford.

6. Investment Committee Report – January 13, 2020

The Chair stated that the Board would take the agenda items out of order to discuss the Investment Committee meeting while Mr. Christenson was in attendance.

Mr. Christenson stated he wanted to provide an update on the RFP interviews. He explained it was a great meeting with active discussions about the interviews. Mr. Christenson noted he has contacted most of the managers that presented to let them know that the Committee will be engaged in further discussions next month in order to potentially make final decisions. He further noted that Marquette prepared a matrix that incorporates the information provided from each potential manager.

In response to a question from the Chair, Mr. Christenson agreed to send out the matrix. He stated he would e-mail it to Ms. Lausier and include some of the additional information requested. Mr. Christenson commented that if any Board members have questions, they should feel free to contact him via email or on his cell phone as he is not often in the office.

In response to a question from Mr. Robles, Mr. Christenson stated that he can add some additional information to the matrix and noted he did add the sectors as requested at the Committee meeting.

The Chair then asked Mr. Nelson if he wanted to offer any additional comments. Mr. Nelson stated that Mr. Christenson's review was generally what was discussed at the meeting. He explained the Committee interviewed seven managers and the Committee needs to make a decision on where it wants to go. The Chair noted it was a closed session Committee meeting, so the Board will not talk about the discussions in too much detail at this meeting. Mr. Nelson agreed and noted that the Committee will discuss the topic further at its next meeting.

Mr. Morgan then moved that the Pension Board adjourn into closed session under Section 19.85(1)(g), Wisconsin Statutes, with regard to items 7-8 for the purpose of the Board receiving oral or written advice from legal counsel concerning strategy to be adopted with respect to pending or possible litigation.

The Pension Board agreed by a roll call vote of 9-0 to enter into closed session to discuss items 7-8. Motion by Mr. Morgan, seconded by Mr. Holton.

7. Contribution Refunds

The Pension Board discussed this item in closed session. Upon returning to open session, the Board took no action on this item.

8. Counsel Update

(a) Voluntary Correction Program

The Pension Board discussed this item in closed session. Upon returning to open session, the Board took no action on this item.

(b) Litigation Update

The Pension Board discussed this item in closed session. Upon returning to open session, the Board took no action on this item.

(c) SECURE Act Changes

The Pension Board discussed this item in closed session. Upon returning to open session, the Board took no action on this item.

(d) Rule Repeal

The Pension Board discussed this item in closed session.

The Pension Board agreed by roll call vote 9-0 to return to open session. Motion by Mr. Nelson, seconded by Mr. Morgan.

Upon returning to open session, the Chair asked if there was a motion regarding the repeal of Rule 1001. Mr. Holton moved that Rule 1001 be repealed, and the motion was seconded by Ms. Bedford.

Mr. Robles moved that the decision regarding Rule 1001 be tabled. There was no second. Mr. Robles stated that he believes notice should be provided to interested parties that this topic is being considered. Mr. Robles further stated that this repeal should be referred to the Comptroller's Office for a determination of a fiscal impact. For these reasons, Mr. Robles stated that he does not believe the Board should act at this meeting. He noted the Board could always bring it up again at another meeting.

The Chair stated that there is a motion and a second for repealing Rule 1001 based on the discussions had by the Board in closed session.

The Pension Board voted 7-1, with Ms. Bedford, Mr. Holton, Ms. LaMendola, Mr. Morgan, Mr. Nelson, the Chair and the Vice Chair voting to repeal Rule 1001 and Mr. Robles disapproving. Mr. Aniban was not present for the vote. Motion by Mr. Holton, seconded by Ms. Bedford.

9. Appeals

(a) D. Muckler

The Chair asked Ms. Muckler and her counsel to present her appeal to the Pension Board. Mr. Robles stated that he was going to recuse himself at this time from any discussions or decision related to Ms. Muckler's appeal.

Ms. McNamara-McGraw introduced herself as Ms. Muckler's counsel and thanked the Chair. She noted that before she discusses Ms. Muckler's appeal, she wanted to express her other concern. She stated that she is concerned that Mr. Robles recused himself. She explained that she is aware that Mr. Robles prepared Ms. Muckler's appeal before he was on the Board, and when he wrote it, he wrote it in good faith. Ms. McNamara-McGraw expressed her concern that he is recusing himself because he or the Board have the mistaken impression that someone who might disagree with the prior decision of the majority is not welcomed as a potentially minority voice.

Ms. McNamara-McGraw then stated she would proceed to discuss Ms. Muckler's appeal. She explained Ms. Muckler retired in 2011 after the Pension Board approved her retirement. Ms. McNamara-McGraw further explained that she believes the Pension Board's view is that Ordinance changes that happen along the way allow the Board to determine that the decision over pensions is not a decision of the Board. Ms. McNamara-McGraw expressed her disagreement with that. She argued that every month the reports of the number of retirees are provided to this Board. She further noted that the Ordinances that the Board is relying on confirms that "the general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of this ordinance are hereby vested in a Pension Board, which shall be organized immediately after" the first four members have taken the oath of office. Ms. McNamara-McGraw explained that Ms. Muckler believes the action related to her pension was an action of the Board.

Ms. McNamara-McGraw continued by stating that in the *Baldwin* case the court said at the time of Ms. Baldwin's retirement in 2003, the Pension Board approved her monthly pension payments. She stated this is precisely what happened to Ms. Muckler. Ms. McNamara-McGraw explained that she wanted to make that point and ask the Board how it was not a decision of the Board, whether by acquiescence or by approval.

Ms. McNamara-McGraw next stated her concern that the Board is relying on the method and interest rate that is part of an Ordinance that was passed by the County Board last year. She asked the Board how this application of this law is not an ex post facto application. She stated that ex post facto laws are not only unlawful under the U.S. Constitution, they are unlawful under the Wisconsin Constitution too. Ms. McNamara-McGraw noted that the Pension Board and the County may adopt Ordinances and Rules on a perspective basis that do not diminish or impair benefits previously approved. She stated her client has previously accrued benefits that were approved in 2011. Ms. McNamara-McGraw contended that the Board is now applying a rule that affects her because of the amount of interest the Ordinance is charging. She contended that even if what the County is doing is legal, she questioned how the County can charge interest against these retirees. She stated it seems unjust to collect such small amounts when other individuals are receiving massive amounts of money through backDROPs and they are not being sued.

Ms. McNamara-McGraw reiterated that charging interest does not seem fair. She noted that she is not discounting that the Pension Board and the County may adopt Ordinances and Rules on a prospective basis that do not diminish for impair benefits previously accrued. She pointed the Board to the *Stoker* case.

Ms. McNamara-McGraw continued by reviewing Ms. Muckler's background facts. She explained Ms. Muckler retired in 2011 with just under 20 years of service. Then years later, in July of 2019, Ms. Muckler received a notice of overpayment. The letter was unsigned and provided no explanation regarding the legal basis for the repayment request or interest charges. Ms. McNamara-McGraw explained that in the *Baldwin* case, part of what the Court of Appeals pointed out is that it is difficult for a person on a limited income to live if their benefits are reduced. She used an example of an individual who is 78 and receives a letter from Social Security saying they overpaid the individual by $50,000 and Social Security will prospectively take $500 off future monthly benefits and charge interest. Ms. McNamara-McGraw asked the Board to put themselves in the positon for a minute so they can see why ex post facto laws are illegal and why changing the rules a year later is illegal.

Ms. McNamara-McGraw next discussed Rule 1001, which she stated she believes applies. Ms. McNamara-McGraw explained that under Rule 1001, any correction must be done within one year of the Pension Board's actions. She stated that under the operation of law, the Pension Board makes the decision about pensions. Ms. McNamara-McGraw argued there is no other Board and no other body. She explained that a pension beneficiary, like Baldwin, has to make plans and know how much money he or she will have each month from his or her pension. Ms. McNamara-McGraw noted that taking an identifiable number of people and clawing back a million and a half dollars does not seem like a reasonable thing to do in the light of the harm it causes. She opined that if the Board wanted to claw back money, it should take legal action against the backDROP recipients because they are the ones who will break the County. Ms. McNamara-McGraw noted that she lives in the County and would like to see ERS succeed, but this just does not make sense.

Ms. McNamara-McGraw then stated that there are questions that Ms. Muckler asked which have not been answered. They would like to have the individuals involved in the final approval of the pension recalculations identified, but they received no response. They also asked when the review of the pension calculations commenced, and they do not have an answer.

Ms. McNamara-McGraw next noted that she previously cited the *Baldwin* case. In that case, the Court concluded that pursuant to the plain language of Rule 1001, the Pension Board did not have authority in 2015 to reduce Baldwin's pension payments to correct for the service credit error and recover related overpayments because the Pension Board's 2003 decision setting the amount of Baldwin's monthly pension payments was an action that became final in 2004. Ms. McNamara-McGraw argued this is precisely what this Pension Board did in Ms. Muckler's case. It did not delegate its decision-making ability to an office in the County. It just designated who could make the decisions that would be trustworthy enough to be presented to the Pension Board and approved. Based on that, Ms. Muckler is in the same situation as Ms. Baldwin. More than a year has passed since her benefit was approved. Now the County appears to be using a new law in an ex post facto way to go back and not only recalculate Ms. Muckler's benefit, but take interest. Ms. McNamara-McGraw asked the Board that even if they continue to claw back the money, to not charge interest. She opined that the Board does not have the right under the new law to apply it retroactively.

Ms. McNamara-McGraw stated that any action by the Pension Board other than in conformity with the decision in *Baldwin* is a violation of Ms. Muckler's rights under the Wisconsin Constitution and the United States Constitution.

Ms. McNamara-McGraw then reviewed in more detail the Court of Appeals' decision in *Baldwin*. She stated that the Court decided that Pension Board Rule 1001 bars any modification of a retiree's pension once more than one year has elapsed. Ms. McNamara-McGraw also cited to additional case law that states that when the only question is one of law, the question is whether the agency has properly interpreted and applied the law. Ms. McNamara-McGraw acknowledged that it is understandable that in order to maintain the Board's point of view it is going to interpret things differently, but she does not believe that the Board has correctly stated the law. She does not believe the Board has addressed the fact that it is a decision of the Pension Board regardless of whether Rule 1040 was passed and the calculations have been delegated to the office because it was the action of the Board that approved the pension benefits. Ms. McNamara-McGraw noted that Ms. Bronikowski makes the report every month to the Board. If it is not in the power of the Board to approve it, why does she bring it to the Board?

Ms. McNamara-McGraw noted that she believes that what the Board is doing is illegal under *Baldwin* and under the cases she cited. She reiterated that the law obligates Milwaukee County and the Pension Board to act in accordance with the *Baldwin* decision. *Baldwin* makes it clear that the action and recalculation of benefits after the one-year period is contrary to the law. Ms. McNamara-McGraw explained that the 14th Amendment provides "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ms. McNamara-McGraw then requested that the Board explain why it is taking 150 retirees and deciding to recalculate benefits to get a hundred million and not, for example, doing the same thing with the backDROP recipients. It does not make sense. Ms. McNamara-McGraw stated that she has provided the Board with what she has with regard to Ms. Muckler's appeal.

She concluded by noting that the end of Ordinance section 201.24(8.24) states that unless otherwise set forth above, this section shall apply to any overpayment or underpayment that as of January 1, 2019 is: not otherwise subject to an agreement or commitment to correction; not currently before a court of competent jurisdiction; or has not been finally adjudicated by a court of competent jurisdiction. Ms. McNamara-McGraw opined that this could be seen as an end run around the courts that would allow some people on one side of the line like Ms. Baldwin to not have her money taken, but Ms. Muckler, who has not yet appeared in court, is subject to the law. Ms. McNamara-McGraw stated that it is a bad section because it is not clear who is protected and who is not. She further noted that the aspects of the Ordinance are not only illegally being applied as ex post facto laws but also deny equal protection to certain employees, including Ms. Muckler.

The Chair asked if there were any questions for Ms. McNamara-McGraw or Ms. Muckler from the Board. Seeing none, the Chair stated that the Board has the information that was provided by Ms. Muckler and Ms. McNamara-McGraw. He explained that the Board would deliberate on this matter further in closed session after which the Office of Corporation Counsel will provide the decision of the Board to Ms. McNamara-McGraw. The Chair stated there would also be a letter sent to Ms. McNamara-McGraw with written confirmation of the Board's decision.

Ms. McNamara-McGraw and Ms. Muckler thanked the Board.

The Board made a motion on this item later in the meeting.

10. Pension Governance

(a) Charter Review and Approval

The Chair stated that the Board previously asked for and received support from the Office of Corporation Counsel and outside counsel in moving the Charters and the Policies forward for a final review. The Chair explained counsel reviewed the documents and the Audit Committee reviewed the changes from counsel. The Chair asked whether there were additional comments from counsel.

Ms. Kearney thanked the Board for the opportunity to have counsel review the Charters and Policies and make some final proposed changes. She stated the goal was to put everything together so the Trustees could see what had been changed over the last few drafts. Ms. Kearney explained that counsel circulated the redlined drafts that include the Trustees' changes and the changes counsel added after the final review. Ms. Culotti agreed with Ms. Kearney and reminded the Board that these are living documents. Accordingly, if the Board implements these and after a few months, decides that changes are necessary, the documents can be revised in accordance with the Board's desires.

The Chair stated that the Board has been preparing and reviewing these documents for almost a year and noted that these documents are meant to provide some codification of the Board's practices. The Chair thanked Mr. Nelson for all of his hard work on these documents as well as Ms. Bedford. He further thanked all the Trustees who sent in comments and provided helpful changes. The Chair then stated that unless there is additional discussion, he would entertain a motion for the Charters.

The Pension Board voted 8-0 to approve the Pension Board Charter, the Appeals and Rules Committee Charter, the Investment Committee Charter, the Actuarial Audit and Risk Committee Charter and the Governance Committee Charter. Motion by Mr. Morgan, seconded by Mr. Aniban. Mr. Robles was not present for the vote.

(b) Policy Review and Approval

The Chair asked for a motion regarding the Policies.

The Pension Board voted unanimously to approve the Actuarial Policy, Self-Assessment Policy, Continuing Education and Travel Policy, Pension Board and Staff Interaction Policy and the Code of Conduct. Motion by Mr. Aniban, seconded by Ms. Bedford.

11. Audit Committee Report – January 9, 2020

The Chair stated that much of what was discussed at the Audit Committee meeting has been picked up through other agenda items, but he asked Mr. Morgan for any additional comments. Mr. Morgan agreed and stated that the minutes reflect what was discussed at the Audit Committee meeting.

12. RPS Report

(a) RPS Director Report

The Chair asked Ms. Bronikowski to provide the Director Report. Ms. Bronikowski stated that currently, the RPS team is working on some of the end-of-the-year and beginning-of-the-year projects. She stated they are anticipating that all of the annual tax statements, the 1099Rs, will be sent by the end of this month, as required. Ms. Bronikowski explained that RPS is also in the middle of the annual valuation process.

Ms. Bronikowski then provided some staffing updates. She stated RPS recently brought in a temporary resource to provide clerical and customer service support. Ms. Bronikowski explained that RPS recently had three resignations. She stated the office coordinator resigned, a retirement analyst resigned and a clerical specialist resigned. Ms. Bronikowski confirmed that RPS is recruiting and hoping to fill those vacancies within the next month or two. She explained that things in general are going well with the staff, and while the team has taken on a little bit of extra work, everyone is in good spirits. Ms. Bronikowski further explained that the resignations were from individuals with different responsibilities, so there are built-in backups for those individuals.

In response to a question from the Vice Chair, Ms. Bronikowski stated that RPS currently has 14 full-time employees with one existing vacancy in addition to the three resignations.

In response to a follow-up question from the Vice Chair, Ms. Bronikowski stated that there should not be an issue with completing the work that needs to get done because RPS has a very competent staff right now. She explained that there may be some overtime, but the team is used to overtime at this time of the year.

(b) Retirements Processed

Ms. Bronikowski continued by reviewing the retirements processed. She stated there were only five retirements in December, which is a common pattern. Ms. Bronikowski explained that people tend to retire earlier in the year rather than later. She noted of the five retirements, two were deferred vested members and three were normal retirements. Of the three normal, two included backDROPs at $300,000 and $100,000. Ms. Bronikowski stated that they are anticipating eleven retirements in January.

(c) Fiscal Reports

Ms. Bronikowski distributed the three documents for the Fiscal Report to the Pension Board. She stated these were prepared by the Fiscal Officer who could not be present at the meeting.

Ms. Bronikowski proceeded to review the key highlights from the last month. She stated that the net change in Plan net assets as of December 31, 2019 is an increase of $41.8 million per Marquette's flash reports. Ms. Bronikowski further stated that the net plan assets held in trust for pension benefits as of December 31, 2019 was $1.73 billion, per the Marquette flash report. She noted that in December, the final employer contribution payment from Milwaukee County was received in the amount of $19.4 million. Thus, it was not necessary to raise other funds to meet the December disbursement needs.

Ms. Bronikowski continued by reviewing the Funds Approved Report. At the December Pension Board meeting, the Board approved $52 million for estimated first quarter 2020 needs. Ms. Bronikowski explained there was a surplus from the fourth quarter of 2019 of $7.5 million, for a total available of $59.5 million. She further explained $18 million will be required in January, leaving $41.5 million.

Ms. Bronikowski next reviewed the capital calls and distributions in December. She stated distributions in December totaled $3.5 million, including $1.2 million from Mesirow Fund VI, $983,000 from Morgan Stanley Prime Property, $486,000 from Adams Street Fund III, $473,000 from Adams Street 2009 U.S. Funds, $297,000 from Adams Street 2009 Non-U.S. Fund, $59,000 from Adams Street 2009 Direct Fund, $11,000 from Siguler Guff Fund III, and $5,000 from Siguler Guff Fund II. Ms. Bronikowski further stated there were three capital calls in November, totaling $3.1 million, including $1.6 million from Mesirow Fund VII, $750,000 from Mesirow Fund VI, and $708,000 from Siguler Guff Fund III.

The Vice Chair clarified that the December 31, 2019 figure is preliminary. She stated that in the past, Marquette has provided the final December 31 numbers as soon as the investment managers provide the fourth quarter numbers. The Vice Chair noted while it is a preliminary number, it is expected to go up, according to Marquette's presentation.

The Chair asked whether RPS has an idea of the timing of the 2020 contributions from the sponsor. Ms. Bronikowski stated she can ask for an exact schedule. She explained there is a schedule, and she believes it begins in June, but she will have to confirm with the Fiscal Officer. The Chair explained he is asking because the disadvantage of receiving a $19 million payment at the end of the year is that it was never invested. Therefore, ERS is not realizing the full investment potential of those funds, which then really just become benefit payments.

In response to a question from Ms. Bronikowski regarding the implementation date of the Charters and Policies, the Chair stated that it was a good question. He noted it would be helpful for RPS to explain its challenges to the Board. That way, the Board can look at the situation in the totality. The Chair stated that he will take volunteers and requests for Committees from the Trustees and be sending an email in that regard next week.

Mr. Nelson left the meeting.

The Vice Chair then moved that the Pension Board adjourn into closed session under Section 19.85(1)(g), Wisconsin Statutes, with regard to item 9(a) for the purpose of the Board receiving oral or written advice from legal counsel concerning strategy to be adopted with respect to pending or possible litigation.

The Pension Board agreed by a roll call vote of 7-0-1, with Mr. Robles abstaining and recusing himself, to enter into closed session to discuss item 9(a). Motion by the Vice Chair, seconded by Mr. Holton.

RPS staff and Mr. Robles left the room.

The Pension Board agreed by roll call vote 7-0 to return to open session. Motion by Mr. Aniban, seconded by Mr. Morgan.

After returning to open session, the Pension Board made the following motion.

The Pension Board denies the appeal by Darcie Muckler consistent with the discretion assigned to it by Ordinance section 201.24(8.17) to interpret the

Ordinances and Rules of the Employees' Retirement System of the County of Milwaukee ("ERS") and makes the following findings of fact:

Factual Background.

1. Darcie Muckler is an ERS member who retired on April 1, 2011.

2. Ms. Muckler was receiving an ERS pension benefit in the amount of $1,563.12.

3. During a routine audit, Retirement Plan Services ("RPS") discovered an error in Ms. Muckler's benefit calculation. Due to a payroll error, Ms. Muckler's 2007 earnings and hours used to calculate her benefit were incorrect.

   (a) RPS uses a member's highest consecutive pay periods to determine a member's Final Average Salary. RPS advised that in her original benefit calculation, Ms. Muckler's 2007 earnings were overstated. When RPS reviewed the correct earnings, Ms. Muckler's 2011 earnings were higher. Accordingly, RPS used the 2011 earnings in the corrective benefit calculation, but Ms. Muckler's corrected benefit was still lower than her initial benefit, resulting in an overpayment.

4. In a letter dated July 31, 2019, RPS notified Ms. Muckler of this benefit calculation error and the overpayment. The letter advised Ms. Muckler that when calculated properly, her monthly benefit should equal $1,457.14. The letter further advised that she received an overpayment in the amount of $11,924.79 (the "Total Amount Owed"), which consists of $9,913.42 in principal (the "Principal Amount Owed"), plus $2,011.37 in interest.

   (a) RPS's July notice offered Ms. Muckler the two repayment options in accordance with Ordinance section 201.24(8.24).[1] The notice also enclosed an Overpayment Collection Form.

   (b) On September 13, 2019, Ms. Muckler completed an Overpayment Collection Form and elected Option 2, under which she would repay the Total Amount Owed through a 10% offset to her corrected monthly benefit.

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[1] Under Option 1, Ms. Muckler would be responsible only for the Principal Amount Owed, and the County would make a payment to the ERS trust on her behalf to cover the interest. If she selected this option, Ms. Muckler would be unable to challenge the overpayment. Under Option 2, Ms. Muckler would be responsible for the Total Amount Owed and interest would continue to accumulate until the overpayment was repaid in full, but she could appeal the overpayment to the Pension Board.

5. Upon receiving RPS's July notice, Ms. Muckler submitted a number of questions to RPS regarding the basis of the recalculation.

6. On September 6, 2019, RPS sent a letter responding to Ms. Muckler's questions regarding the recalculation of her benefit. Ms. Muckler responded that same day asking for responses to her other questions related to the overpayment, including the legal authority for RPS to recover overpayments.

7. Ms. Muckler met with RPS staff on September 13, 2019 to discuss the error and overpayment. A day after the meeting, Ms. Muckler sent an email with additional questions.

8. On September 20, 2019, Ms. Muckler sent another email asking that the balance of her questions provided in her September 6, 2019 email be addressed.

9. On September 25, 2019, Timothy Coyne, then Director of RPS, sent a letter to Ms. Muckler reiterating RPS's explanation regarding the recalculation of her benefit and noting that RPS cannot provide an exact date that the overpayment was discovered. Mr. Coyne further advised that RPS cannot comment on specific court cases in response to Ms. Muckler's request that RPS provide a legal basis for the recovery of her overpayment under *Baldwin v. Milwaukee County*.[2]

10. In a letter dated October 3, 2019, Ms. Muckler requested an appeal of RPS's decision to reduce her benefit and recoup the overpayment. In this appeal letter, Ms. Muckler described a number of arguments related to her appeal, all of which are described below.

11. Ms. Muckler and her attorney attended the Pension Board's January 22, 2020 meeting and presented Ms. Muckler's appeal to the Board. The applicable arguments made at the meeting are also described below.

Pension Board Findings.

<u>Benefit Calculation Error and Overpayment</u>.

12. Under Ordinance section 201.24(2.8), RPS calculates Final Average Salary based on the three or five consecutive years of service during which the member's earnable compensation was the highest. Rule 1045 provides that in calculating this, RPS will use the member's earned compensation during the 78 or 130 consecutive pay periods during which the member's earned compensation was the

[2] 2018 WI App. 29, 382 Wis. 2d 145, 913 N.W.2d 194 (2018).

highest. Whether three or five years is used depends on the member's represented status and when the member commenced ERS employment.

(a) Ms. Muckler's Final Average Salary was calculated based on the highest three years (78 pay periods) during which her earned compensation was the highest.

13. When RPS initially calculated Ms. Muckler's Final Average Salary there was a mistake in the records that caused an overstatement of Ms. Muckler's 2007 earnings. When RPS had the accurate earnings information, it determined that Ms. Muckler's highest consecutive pay periods were actually from 2008 through 2011.

14. The Pension Board finds that RPS must pay benefits only in accordance with the Ordinances and Rules. Additionally, RPS must use the accurate earnings for Ms. Muckler and determine the highest 78 consecutive pay periods based on the accurate earnings information. Accordingly, the Pension Board finds that the inaccurate earnings information resulted in an error and an overpayment in pension benefits.

<u>Correction of Pension Benefit Amount and Recoupment of Overpayment</u>.

15. ERS is a tax-qualified retirement plan under the Internal Revenue Code (the "Code"). In order to retain its tax-qualified status, ERS must comply with the Code requirements applicable to governmental plans.

16. The Internal Revenue Service ("IRS") requires tax-qualified retirement plans to correct errors, including overpayments. The IRS issued its Employee Plans Compliance Resolution System ("EPCRS") to provide guidance to plans on how to correct errors. See Rev. Proc. § 2019-19.

(a) Under EPCRS, a retirement plan corrects an overpayment by reducing the member's benefit to the correct benefit amount under the plan and recovering the overpayment.

17. Besides correcting errors, ERS must comply with IRS regulations that require a tax-qualified retirement plan to follow the terms of its written plan document. See Treas. Reg. § 1.401-1(a)(2)-(3). Under this requirement, ERS may pay benefits only in accordance with the Ordinances and Rules.

18. Milwaukee County, as ERS Plan Sponsor, adopted Ordinance section 201.24(8.24), which directs how ERS should recover overpayments and correct errors.

19. Under Ordinance section 201.24(8.24) and IRS requirements, upon discovery of a payment in error, RPS must calculate the correct benefit amount and pay that corrected benefit amount going forward.

    (a) An audit revealed that Ms. Muckler's Final Average Salary was calculated using overstated earnings from 2007. Upon discovering this error, RPS reduced Ms. Muckler's benefit prospectively to $1,457.14. According to RPS, this is the proper benefit Ms. Muckler should be receiving under the Ordinances and Rules. The Pension Board finds that RPS acted in accordance with Ordinance section 201.24(8.24)(1) and IRS requirements when it adjusted Ms. Muckler's monthly benefit to reflect the corrected benefit amount.

20. Ordinance section 201.24(8.24) also directs how overpayments should be recovered to comply with the IRS requirements that ERS be made whole for overpayments.

    (a) Ordinance section 201.24(8.24)(3)(a) requires RPS to send a Notice of Overpayment upon discovering an erroneous overpayment. This Notice must contain substantive information related to the amount of the corrected benefit and the overpayment. The Notice must also include several pieces of processing information and include an Overpayment Collection Form, which sets forth the two overpayment collection options provided in Ordinance section 8.24(3)(c).

    (b) In accordance with the Ordinance, RPS sent Ms. Muckler a Notice of Overpayment on July 31, 2019. RPS's July Notice contains the information and enclosures required under subsections (a) and (b) of Ordinance section 8.24(3).

21. Ordinance section 201.24(8.24)(3)(c) provides overpayment recipients with the option to have the County contribute the interest portion of the overpayment (Option 1). If that Option 1 is not elected, the Ordinance requires ERS to recover the overpayment from the recipient of the overpayment (Option 2).

    (a) Because Ms. Muckler received an overpayment and did not elect Option 1, the Pension Board finds that RPS properly proceeded to recover the overpayment from Ms. Muckler, including through the offset of her future benefits.

<u>Rule 1001 and the *Baldwin* Decision</u>.

22. Ms. Muckler argues[3] the Wisconsin Court of Appeals' decision in *Baldwin v. Milwaukee County* precludes the Pension Board from recalculating her pension benefit to pay her the correct amount and from recovering the overpayment from her. Ms. Muckler further argues that under *State ex re. Dicks v. Employee Trust Fund Board*, the Pension Board is bound by the rule in Baldwin and that any action not in conformity with Baldwin would be arbitrary and capricious. 202 Wis.2d 703, 551 N.W.2d 845 (Ct. App. 1996).

(a) Rule 1001 provides "All actions of the board affecting the status of rights of any individual employee or his beneficiaries shall be considered to be final after expiration of one (1) year from the date such action was taken."

(b) In *Baldwin*, the court held that by ratifying a list of retirements that included Ms. Baldwin's retirement, the Pension Board took an "action" regarding Ms. Baldwin's retirement in 2003. For this reason, under the circumstances of *Baldwin*, the court concluded that Rule 1001 barred the Pension Board from taking further action regarding Baldwin's benefit after more than one year had elapsed.

23. After carefully reviewing Ms. Muckler's arguments in her letters and at the Pension Board meeting, the Pension Board finds that Rule 1001 and the *Baldwin* decision do not prohibit RPS from correcting Ms. Muckler's pension benefit to the correct amount under the Ordinances and Rules or recovering the overpayment from Ms. Muckler.

24. The Court of Appeals' application of Rule 1001 in *Baldwin* was based on the plain language of Rule 1001, the factual circumstances of that case and the Court's determination that the Pension Board took an "action" regarding Ms. Baldwin's retirement in 2003.

(a) Ms. Muckler has argued that she is in the same position as Ms. Baldwin, but has not identified an "action" taken by the Board with regard to her pension benefit.

(i) Ms. Muckler contends that the Pension Board receives reports regarding the number of retirees that retired the prior month at each meeting. She relies on Ordinance section 201.24(8.1), which provides the Pension Board is responsible for the general administration and responsibility for the proper operation of ERS and for making effective the provisions of the Ordinances, to argue

[3] Ms. Muckler has had the assistance of different counsel throughout her appeal process. Because all counsel have been working on behalf of Ms. Muckler, this decision refers to arguments made by counsel as Ms. Muckler's arguments.

that the Pension Board took an action with regard to her pension benefit when she retired in 2011. Ms. Muckler further argues that the Pension Board did not delegate its decision-making abilities to RPS but instead decided who would present the information to the Pension Board for approval.

(b) The Pension Board finds the facts of *Baldwin* are distinguishable from this matter. In Ms. Baldwin's case, she argued that the Pension Board took "action" when it voted to ratify Ms. Baldwin's retirement (including the amount of her monthly benefit) at a 2003 meeting.

(i) The Court of Appeals in *Baldwin* reviewed the elements of Rule 1001 and included a discussion of what "action" occurred in that case. It referred to Black's Law Dictionary in defining action as the "process of doing something; conduct or behavior" or as "a thing done." Based on the minutes of the October 2003 meeting, which showed that the Board "approved a motion to ratify the pension payment amounts for twenty-two persons," the Court concluded that the Pension Board's vote with regard to Ms. Baldwin's pension payments was a conduct, behavior or a thing done.

(ii) In Ms. Muckler's case, the Pension Board took no such action. Instead, for all retirements after October 2007, the Pension Board adopted Rule 1040, which delegates the authority to approve the retirement pensions of members to the Manager of ERS[4] in accordance with the Ordinances and Rules. Ms. Muckler's retirement commenced via the procedure described in Rule 1040, not via any "action" taken by the Pension Board.

(iii) Furthermore, the Board cannot take action as a Board by simply receiving a report as Ms. Muckler suggests. Ordinance section 201.24(8.5) and Rule 1052(c) both require that a decision of the Pension Board must be made with at least five votes. If the Pension Board does not vote on a matter, five votes cannot be counted and a decision cannot be made.

(c) The Court of Appeals in *Baldwin* emphasized that it must adhere to the plain language of the Ordinances and Rules. Here, too then, must the Pension Board. Rule 1001 requires "actions of the board." In Ms. Muckler's case, there was no action taken by the Pension Board, nor even

[4] The position of Manager of ERS is now called Director of ERS.

a vote, with regard to her pension benefit until this appeal heard by the Pension Board in January 2020.

25. Because the Pension Board has taken no action regarding Ms. Muckler's ERS benefit, the Pension Board finds that the application of Rule 1001 in *Baldwin* is inapplicable to Ms. Muckler's circumstances. Furthermore, the Pension Board finds that the delegation of approval of retirements to the Director of ERS is limited to approving retirements that are calculated within the requirements of the Ordinances and Rules. Ms. Muckler's original pension benefit amount was calculated in error and outside of the Ordinances and Rules; thus, the Director of ERS could not approve her retirement under the delegation authority in Rule 1040.

    (a) Because the Pension Board finds that the application of Rule 1001 as interpreted by Baldwin is factually distinguishable and therefore inapplicable to Ms. Muckler's circumstances, it also finds that the *Dicks* decision does not affect the Pension Board's decision.

26. Additionally, the Pension Board as the fiduciary of ERS must comply with IRS requirements for governmental plans, which includes correcting errors, making ERS whole for overpayments, as well as following the Ordinances and Rules. Failing to comply with such requirements could jeopardize the tax-qualified status of ERS. The Pension Board finds that *Baldwin* does not supersede the Pension Board's fiduciary duty to keep ERS tax-qualified under the federal tax laws.

    (a) Under Ordinance Section 201.24(8.24), Ms. Muckler had an opportunity to have the County contribute a portion of her overpayment, but she chose not to accept that opportunity. The IRS's correction program mandates that the Pension Board recover overpayments, plus interest. In the absence of the County's agreement to repay the overpayment or a portion of the overpayment (as would have been the case with Option 1), the Pension Board has no choice but to recover overpayments from the recipient of the overpayment, Ms. Muckler. The Ordinance and IRS guidance do not provide for an exception for Rule 1001 or a one-year statute of limitations.

    (b) Accordingly, the Pension Board finds that Rule 1001, as interpreted in *Baldwin*, does not override the Pension Board's fiduciary duties consistent with federal tax laws, state laws, or the Ordinance provisions that direct the Pension Board to recover overpayments from members under Option 2.

27. In conclusion, the Pension Board finds that Rule 1001, as interpreted by the Court of Appeals in *Baldwin*, does not prohibit the correction of Ms. Muckler's benefit

calculation error or the recovery of her overpayment under the circumstances of her case.

Constitutional Arguments.

28. Ms. Muckler asserts that the correction of her pension benefits and recoupment of her overpayment is an impairment of her contractual rights to her pension, which is a protected right under Article I, Section 12, of the Wisconsin Constitution. She argues that there is no authority for a new rule that retroactively impairs her existing pension rights.

29. Article I, Section 12 prohibits the State from enacting a law that impairs its existing contractual obligations. In other words, there must be a contractual relationship and a change in law that impairs that contractual relationship.

(a) To begin, as a legal and factual matter, it is not entirely clear that Article I, Section 12 applies to Ms. Muckler's pension benefit because the State has not acted to impair a contract in this circumstance. Further, even if Article I, Section 12 applies, the circumstances of this case do not satisfy the requirements of *Energy Reserves Group, Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 411 (1983) as explained in *Wisconsin Professional Ass'n, Inc. v. Lightbourn*, 2001 WI 59, 243 Wis. 2d 512, 593-594.

(b) It appears Ms. Muckler is referring to Ordinance section 201.24(8.24) as the "new rule." However, this Ordinance is not the origin of recouping overpayments or assessing interest on them. ERS Rule 1050, which was adopted shortly after Ms. Muckler commenced benefits, has long mandated that errors be corrected, overpayments be recovered, and provided for the assessment of interest from the date overpayments began. This Rule in turn was adopted by the Pension Board due to the IRS's requirement that to correct an overpayment, the plan must recover the overpayment plus interest and pay the correct benefit amount going forward.

(c) By correcting Ms. Muckler's benefit and recouping her overpayment, the Pension Board is not enacting any new rules that impair existing contractual obligations. Instead it is complying with IRS guidance for correcting plan errors and the Ordinances.

(d) Additionally, as noted, Ms. Muckler's original benefit was calculated in error outside of the Ordinances and Rules. The Pension Board finds that

Ms. Muckler has no vested right, and therefore no contractual right, to a benefit that is not provided for under the Ordinances and Rules.[5]

30. Ms. Muckler has contended that if the Pension Board does not follow the Court's decision in *Baldwin* and ignores its statutory obligations, it would violate the Due Process Clause under the Fourteenth Amendment to the U.S. Constitution.

(a) An underlying premise to the foregoing arguments is that the enforcement of Rule 1001 in Ms. Muckler's case is foreclosed by the Court of Appeal's decision in *Baldwin*.

(b) As described above, the Pension Board finds that the Court's application of Rule 1001 in *Baldwin* is distinguishable from the circumstances in Ms. Muckler's case. Accordingly, the Pension Board finds that it is not acting contrary to *Baldwin* by correcting Ms. Muckler's benefit and requiring her to repay the overpayment.

(c) Furthermore, the Pension Board finds that Ms. Muckler had no vested right, and therefore no property right, in an incorrect benefit not provided for under the Ordinances and Rules.

(d) Finally, the Pension Board determines that Ms. Muckler was afforded due process in relation to consideration of her pension benefit.

31. Based on the foregoing, the Pension Board finds that the correction of Ms. Muckler's benefit and recovery of her overpayment in accordance with the IRS guidance and the Ordinances and Rules do not impermissibly infringe upon Ms. Muckler's federal or state constitutional rights.

<u>Interest and Wis. Stat § 138.045</u>.

32. Ms. Muckler argues Wisconsin Statute section 138.045 prohibits the Pension Board from collecting interest based on the first date she received an overpayment. She further argues that the Pension Board cannot rely on Ordinance section 201.24(8.24) to require interest on Ms. Muckler's overpayment.

33. As explained above, Ordinance section 201.24(8.24) is not the origin of recouping overpayments or assessing interest on them. This Ordinance simply provides updated overpayment collection procedures and repayment options, including an option for the County to contribute a portion of the overpayment. The IRS and

[5] This line of reasoning has been approved by courts. *See Mielcarek v. Pension Bd. of the Emps.' Retirement Sys. of the Cnty. of Milwaukee*, No. 11-CV-1095 (Wis. Cir. Ct. Milwaukee Cnty. Oct. 31, 2011); *Benson v. Gates*, 188 Wis. 2d 389, 404, 525 N.W.2d 278 (Ct. App. 1994).

ERS Rule 1050 have long mandated that overpayments be recovered with interest and provided for the assessment of interest from the date overpayments began.

34. The Pension Board also finds that Wisconsin Statute section 138.045 does not apply to Ms. Muckler's overpayment.

(a) Wisconsin Statute section 138.045 does not set a limit for calculating interest on overpayments paid by Milwaukee County's ERS. Additionally, the statute does not limit when interest for an overpayment may begin to accrue. In fact, the statute does not set any kind of limit. The statute merely provides one method for the calculation of interest which *may* be used when the method is disclosed in a "note, bond, or other instrument."

Additional Arguments

35. A number of Ms. Muckler's additional arguments center on the idea that it is unfair for the County and the Pension Board to ask overpayment recipients to repay the overpayments they received. Ms. Muckler noted that many retirees are on fixed budget and any decrease in their benefits can be challenging for them.

36. The Pension Board hears Ms. Muckler's comments and agrees that these sorts of circumstances give rise to difficult situations for all involved: the County, the Pension Board and the retirees.

(a) However, the Pension Board is the fiduciary of ERS and as such must make decisions in accordance with the Ordinances and Rules and IRS guidance for governmental retirement plans. The Pension Board must correct errors, both overpayments and underpayments, in order to keep the Plan tax-qualified.

(b) With overpayments, the IRS mandates that ERS be made whole for overpayments, including interest. The County provided members with an avenue for the County to contribute the interest portion of members' overpayments. Because IRS rules require that ERS be made whole, if a recipient does not elect that option, the Pension Board must look to the recipient of the overpayment.

37. The Pension Board remains mindful of the difficulties that retirees face and works cooperatively with RPS to continually improve its administration of ERS.

The Pension Board voted 7-0-1, with Mr. Robles abstaining. Motion by Mr. Holton, seconded by Mr. Morgan.

13. Administrative Matters

(a) Secretary Appointment

The Chair asked Ms. Culotti to provide some background on the Secretary Appointment. Ms. Culotti stated that by Ordinance, the Board may appoint a Secretary of the Pension Board. She noted that the Secretary may but need not be a Pension Board Trustee. Ms. Culotti explained that Mr. Huff was the Secretary before her and prior to Mr. Huff, the Secretary was the Director of RPS. Ms. Culotti further explained that while it is up to the Pension Board to appoint someone, the Pension Board Charter generally contemplates that the Director of RPS is the Secretary. Because the Pension Board Charter was adopted, the appointment of Secretary is again before the Board.

In response to a question from Mr. Aniban, Ms. Culotti and Ms. Bronikowski agreed that Ms. Bronikowski would continue to coordinate with outside counsel to prepare the minutes. The Vice Chair confirmed that this has always been a collaboration.

The Chair stated that to be consistent with the Pension Board Charter, it would make sense to have Ms. Bronikowski be the Secretary.

The Pension Board voted unanimously to appoint Ms. Bronikowski as the Secretary of the Pension Board. Motion by Mr. Aniban, seconded by Mr. Holton.

(b) 2020 Meeting Calendar

The Chair stated he would move through the administrative matters in reverse order. He noted that he will be contacting the current Committee Chairs and with the assistance of the Vice Chair, developing a meeting calendar and Committee membership.

(c) Board Member Attendance at National Association of Securities Professionals: Diverse and Emerging Manager Forum

The Chair stated that this Forum has passed, but he attended and it included an excellent discussion on these issues, especially because of the nature of the program in the State of Illinois. He explained they have had success working with managers and first-time funds, which has been part of the Board's discussion with regard to the recent RFPs.

(d) M. Harper Participation in Institutional Real Estate Americas Spring Editorial Advisory Board meeting

The Chair stated he was invited to attend the Institutional Real Estate Spring Editorial Advisory Board meeting to participate in discussions around institutional real estate investing. He noted the Board currently works with two managers in this area, but this presents an opportunity to hear what is happening in this asset class. The Chair explained that while real estate is coming off of a long cycle, there are happenings in some of the other spaces, including value added and opportunistic real estate. The Chair noted that there was no cost to ERS, it is just the cost of his time to participate, which he is willing to do.

(e) Board Member Attendance at Teacher Retirement System of Texas 2020 Emerging Manager Conference

The Chair then stated the third educational opportunity is an upcoming conference sponsored by the Teacher Retirement System of Texas ("TRS"). He explained TRS has an annual emerging manager conference. The Chair noted there is no cost to attend, just travel and the Trustee's time. He stated approximately 700 to 800 managers and investment professionals attend this conference to talk about TRS's robust program.

(f) Board Member Participation in Wharton School of Business Private Equity Program: Investing and Creating Value

The Chair continued by stating that the final educational opportunity is through Wharton, which the Board already has a relationship with through the International Foundation of Employee Benefit Plans ("International Foundation"). The Chair explained this program is with regard to private equity investments and is a program that he would be interested in participating in. The Chair noted it is a weeklong program at the Wharton School, and their programs are some of the better programs that the Chair has attended. He encouraged any of the Trustees to consider the Wharton Executive Education program and the International Foundation's offerings. The Chair stated he wanted to present this to the Board today with his request and commitment to participate, and to encourage all of the Trustees to take the continuing education process seriously.

In response to a question from Ms. Kearney regarding the invitation for him to participate in the Advisory Board, the Chair stated that there was no registration fee and travel and accommodations are provided for. Ms. Kearney noted that the agenda item then is more to let the Board know the Chair is participating.

The Chair stated he had one more item under Administrative Matters, which the Board can revisit next month in connection with planning for the annual meeting. The Chair explained that prior to the departure of Mr. Coyne, he had provided each Trustee with a copy of the "U.S. Public Pension Handbook: A Comprehensive Guide for Trustees and Investment Staff." The Chair stated that this Handbook was written by Von M. Hughes who the Chair had the occasion to meet last week. The Chair explained that he thought it would be good to consider Mr. Hughes as a part of the Board's annual meeting. The Chair stated that while this would be a bit of a departure from having the investment consultant present, Mr. Hughes is an excellent resource in terms of the overall universe of public pension plans.

In response to a question, Ms. Bronikowski stated that there is an individual who is on the agenda for confirmation by the County Board to fill one of the open appointed positions on the Pension Board. She noted that there will not be an employee election for Mr. Holton's position because only one individual submitted complete nomination papers. Accordingly, that individual will be starting a term in March after Mr. Holton's term ends.

14. <u>Adjournment</u>

The meeting adjourned at 12:35 p.m.

Submitted by Erika Bronikowski,
Secretary of the Pension Board